No. 77-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC LAND RESOURCES CORPORATION AND SANTA FE PACIFIC RAILROAD COMPANY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

RUSSELL H. CARPENTER, JR.
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006

BYRON D. STRATTAN
Suite 1000
110 N. Fourteenth St.
Omaha, Nebraska 68102

C. GEORGE NIEBANK
ROBERT R. BATESON
DENNIS W. WILSON
80 E. Jackson Blvd.
Chicago, Illinois 60604

Counsel for Amici

Of Counsel:

COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006

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Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions below are listed in and appended to the petition for writ of certiorari.[1]

QUESTION PRESENTED

Whether Congress intended to reserve an easement for federal rights-of-way across the lands granted by the United States under the Pacific Railway Act of 1862 as amended ("the Union Pacific Act"), although neither the Act nor its legislative history contains any mention of reserved rights-of-way and the United States has never before claimed any such reservation in the some 110 years since the Act was passed.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are appended to the petition for writ of certiorari.

INTERESTS OF AMICI CURIAE

1. *Union Pacific Land Resources Corporation (UPLR).*—UPLR is a wholly-owned subsidiary of Upland Resources Corporation, which in turn is owned by Union Pacific Corporation. Union Pacific Corporation also owns Union Pacific Railroad Company, which operates a 15,800-mile rail system extending from the Missouri River to the Pacific Ocean.

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[1] The appendices contained in the petition for a writ of certiorari are cited here as "Pet. App."

Under the Union Pacific Act, Congress granted to the original Union Pacific Railroad Company ("the Railroad") all the odd-numbered sections of public land within 20 miles of each side of its right-of-way. The even-numbered sections remained in Government hands, creating a checkerboard pattern of private and public ownership in a 40-mile belt across the West. The primary purpose of the grant, which totalled some 18.8 million acres, was to encourage and assist the Railroad in the construction of its rail line. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 59-60 (1878). Over the past century, granted lands have been conveyed and reconveyed in countless transactions, so that they are now held by thousands of private owners including the petitioners in this case.

UPLR presently owns the fee to the entire estate in some 865,000 acres of the granted lands. Although this case is immediately concerned with only some 50,000 acres owned by the petitioners, the decision below directly affects UPLR's holdings as well. The Court of Appeals imputes to the 1862 Congress a heretofore undiscovered intent to reserve an easement for public rights-of-way across *all* the lands granted under the Union Pacific Act. Since UPLR's land-grant holdings far exceed the holdings immediately at issue here, it seems certain that the decision, if allowed to stand, will ultimately have a far greater impact on UPLR than on the petitioners.

2. *Santa Fe Pacific Railroad Company (Santa Fe Pacific).*—Santa Fe Pacific is a wholly-owned subsidiary of Santa Fe Industries, Inc. Santa Fe Industries also owns all the stock of The Atchison, Topeka & Santa Fe Railway Company, which operates a 12,000-mile rail system between Chicago and California.

Santa Fe Pacific holds fee title to some 150,000 acres of the more than 13 million acres originally granted by Congress to the Atlantic & Pacific Railroad Company under the Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294 ("the Santa Fe Act").[2] Like the Union Pacific grant, the Santa Fe grant was of alternate odd-numbered sections and resulted in a checkerboard pattern of private and public ownership of land along the railroad right-of-way.

Although the decision below does not purport to address the intent of Congress in the Santa Fe Act, it nevertheless poses a substantial threat to Santa Fe Pacific's interest in the lands granted under that Act. The Court of Appeals' decision is not based on any express language in the Union Pacific Act or on any underlying legislative history reflecting a congressional intent to reserve an easement for rights-of-way across the granted lands. Santa Fe Pacific is, therefore, confronted with the serious risk that the United States will in due course assert that the court's facile analysis of congressional intent is no less applicable to the Santa Fe grant than it is to the Union Pacific grant. As a result, Santa Fe Pacific also has a significant interest in this case.

STATEMENT OF THE CASE

Amici adopt the petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

The decision below unsettles titles throughout the West that have been unchallenged, on the point in ques-

[2] The properties of the Atlantic & Pacific Railroad Company were acquired by Santa Fe Pacific pursuant to the Act of March 3, 1897, ch. 374, § 1, 29 Stat. 622, and most of the lands were subsequently conveyed to other private parties.

tion, for more than a century. The Court of Appeals purports to discover a tacit reservation of an easement by the Government in an 1862 land grant that the Government has consistently construed as requiring it to pay compensation for taking such easements. This discovery is made without support in either the statute or the pertinent legislative history and without any suggestion that the United States can make the sort of showing of necessity required to imply a private easement under common law rules. Instead, the decision is based simply on the court's own view that it would have been imprudent for Congress not to reserve such an easement in the Union Pacific grant. Whatever the merits of that view as a matter of original policy, it was not the court's function to make such a judgment, some 110 years after the Act was passed, when generations of private owners have bought, sold and developed the granted lands on the unchallenged assumption that the lands were not subject to public use without consent or compensation.

The full impact of the court's unprecedented holding is not likely to be confined to the some 18 million acres granted under the Union Pacific Act. The United States may well contend in the future that the logic of the decision is equally applicable to the 13 million-acre Santa Fe grant and to other similar federal railroad checkerboard land grants. Such congressional grants in the 19th Century totalled well over 100 million acres,[3] an area equal to the entire land surface of the States of Missouri, Minnesota and Illinois. The decision be-

[3] P. Gates, *History of Public Land Law Development* 384-85 (1968).

low casts a cloud of uncertain scope[4] across the many thousands of private western land titles ultimately founded on these grants.

The Court of Appeals reaches its profoundly unsettling result by taking impermissible advantage of congressional silence to impute an intent that Congress never voiced. In doing so, the court overturns some 110 years of consistent administrative practice and construction, in an area where the need for certainty has long been recognized as paramount, and also seriously misconstrues both the Unlawful Inclosures Act, 43 U.S.C. §§ 1061-66, and prior decisions of this Court. By any measure, the decision below presents a major question of federal statutory construction that should be decided by this Court. Cf. Sup. Ct. R. 19(1)(b).

I. The Decision Below Impermissibly Improvises a Congressional Intent.

A congressional grant of public lands "operates as a law as well as a transfer of the property . . . ." *Schulenberg* v. *Harriman*, 88 U.S. 44, 62 (1875). The intent of Congress must therefore "control in the interpretation" of such a grant.[5] *Wisconsin C. R.R.* v. *Forsythe*,

[4] The Court of Appeals held that Congress "intended to reserve an easement to permit access to the even-numbered sections which were surrounded by lands granted to the railroad." Pet. App. xi. The court made no attempt to delimit the extent or location of the reserved easement. In its reply brief below (p. 4), the United States indicated that it was asserting only a public "right of access over the common interlocking corners" of the private odd-numbered sections and the public even-numbered sections; but the Court of Appeals did not purport to adopt such a limitation.

[5] Thus, the United States could not resort to rules of common law to imply a reserved easement that Congress did not in fact intend to reserve in connection with the grant of lands made in the Union Pacific Act. The common law will recognize an "implied reservation of a way . . . in favor of a grantor" where there is a showing of "necessity" and the grantor "has no other practical means of approach to his lands." *United States* v. *Rindge*, 208 F. 611, 620 (S.D. Cal. 1913); accord, *e.g.*, *Westminster Investing Corp.* v. *Kass*, 266 F. Supp. 597, 599-600 (D.D.C. 1967). Here, the trial court found that the United States cannot make such a showing of necessity, since its "sovereign power of eminent domain permits [it] to condemn such rights-of-way as may be reasonably required for access to any public lands . . . ." Pet. App. v.

159 U.S. 46, 55 (1895). See also, *e.g.*, *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900); *United States* v. *Southern P. R.R.*, 146 U.S. 570, 598 (1892).

Consistently with this view, the Court held long ago that the grant of lands made under the Union Pacific Act was subject only to such reservations as Congress had clearly expressed. In *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491 (1878), the Court said "there can be no reasonable doubt" that Congress' intent in the Act was "to aid in the construction of the railroad by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ." *Id.* at 497 (emphasis added). Since there was no congressional mention of any reservation for the interest asserted in *Missouri, K. & T. Ry.*, the Court concluded that no such reservation had been intended.[6]

[6] *Missouri, K. & T. Ry.* involved conflicting claims to some 90,000 acres of land in Kansas. The Kansas Pacific Railway claimed such land by virtue of a grant made to its predecessor in the Union Pacific Act of 1862; the Missouri, Kansas & Texas Railway claimed the same land under a grant made by Congress on March 3, 1863. This Court held that the Kansas Pacific's title to the disputed lands "took effect by relation as of . . . 1862" upon construction of its road "so as to cut off all intervening claimants *except in cases where reservations were specially made in*" the Union Pacific Act. 97 U.S. at 498 (emphasis added). Since the Act was silent regarding the reservation of "any portion of the designated lands for the purpose of aiding in the construction of other roads" (*id.* at 498-

See also *St. Joseph & D.C. R.R.* v. *Baldwin*, 103 U.S. 426, 430 (1881); *Stuart* v. *Union P. R.R.*, 227 U.S. 342, 353-54 (1913). The same conclusion plainly is required here, for it is likewise impossible to find any congressional mention of the easement now asserted by the United States.

The Court of Appeals admitted that there is "no express reservation of an easement" in the Union Pacific Act. Pet. App. x. On its face, the Act conveys unqualified, absolute title to the granted lands.[7] Nor did the court claim that the legislative history makes any mention of a reservation for easements of way. In fact, the legislative history, like the Act itself, is completely silent regarding a reservation of any such interest.[8] Thus, the pertinent legislative materials provide no basis for any determination that Congress "intended" to reserve rights-of-way over the granted lands. Pet. App. xi.

However, the Court of Appeals was "unable" to accept the conclusion that Congress, despite its silence, had not intended to reserve any right-of-way. Pet. App.

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99), the Court held that full title to the disputed lands "had already passed from the government" to the Kansas Pacific when Congress made its 1863 grant and the Missouri, Kansas & Texas could claim nothing. *Id.* at 500-01.

[7] The Act does contain express exceptions reserving certain types of land from the grant; such express reservations serve only to confirm that Congress did not intend any reservation of an easement. See p. 10, below.

[8] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 1906-13, 2749-62, 2776-89, 2804-18 (1862); Cong. Globe, 38th Cong., 1st Sess. 2376-84, 2395-2404, 2417-24, 3148-56 (1864). To the extent that the legislative materials reflect any congressional consideration of public entry onto the granted lands, those materials indicate that Congress had no intention to reserve any right of access. See p. 10, below.

xi. Lacking support in the pertinent legislative materials, the court declared that the underlying purpose of Congress in aiding the construction of western railroads was "to give access to the unsettled territories and to encourage settlement and development of those lands," and that a reservation for rights-of-way was necessary to effectuate this general purpose. Pet. App. xi. "To hold to the contrary," the court said, "would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted." Pet. App. xi. In so saying, the court itself supplied an intent that Congress had nowhere expressed.

As a matter of abstract reasoning, a modern court might well conclude that a prudent Congress would have reserved easements for rights-of-way across the lands granted under the Union Pacific Act. But the perspective of the 1862 Congress was quite different (see p. 10 n. 10, below), and it was for that Congress, not for the court below, to determine what specific measures were appropriate to achieve a general underlying purpose such as opening the West.[9] Moreover, even if the intent of Congress in 1862 could properly be divined by speculation rather than by reference to what Congress said, there would be no real difficulty in understanding that it need not have perceived any compelling

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[9] See *Berman* v. *Parker*, 348 U.S. 26, 33 (1954), where this Court held that, so long as the purpose is within Congress' power, "the means by which it will be attained is . . . for Congress to determine." In accordance with this view, it has long been established that, in issuing land patents, administrative authorities cannot reserve what Congress has in fact granted. *E.g.*, *Shaw* v. *Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback* v. *Hawke*, 115 U.S. 392, 406 (1885). Certainly, the courts have no greater authority to imply a reservation where Congress intended none.

reason to reserve rights-of-way.[10] Indeed, the West seems to have been opened, settled and developed with some success during the last 110 years, even though the reservation just discovered in the court below was unknown and unasserted (see pp. 13-14, below).

Furthermore, contrary to what the court below implies the 1862 Act in fact reflects close congressional attention to what interests were to be excluded from the grant. The Act expressly excepts from the grant certain categories of lands, including swamplands, homesteads, and lands previously sold or reserved by the United States.[11] And the legislative history shows that Congress specifically considered and rejected a proposed reservation that would have allowed public entry onto the granted lands for limited purposes. See Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862). In these circumstances, the absence of any express reservation for rights-of-way seems—as this Court has recognized in closely analogous circumstances—"conclusive" that no such reservation was intended. See *St. Joseph &*

[10] It is unlikely that a Congress in 1862, confronted with the task of opening an empty wilderness, perceived rights-of-way for access to interlocking sections as a significant problem. At that time, questions of title posed little, if any, restraint to movement across the vast western lands. Cf. *Buford* v. *Houtz*, 133 U.S. 320, 327-28 (1890). And, to the extent that necessary access to public and private lands was denied, Congress had available its power to acquire rights-of-way by eminent domain. While reservation of rights-of-way might appear to have been the most sensible course to a court looking at a West that is no longer empty, the Act must be construed from the perspective of the Congress that passed it. See, *e.g.*, *Platt* v. *Union P. R.R.*, 99 U.S. 48, 64 (1878).

[11] See Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

D.C. R.R. v. *Baldwin, supra,* 103 U.S. at 430. See also *Stuart* v. *Union P. R.R., supra,* 227 U.S. at 353.[12]

Finally, the court's imposition of its contemporary view on a 19th Century grant is especially troubling because the ultimate issue here is the quality of title to real property. A hundred years of titles to the lands conveyed under the Union Pacific Act are grounded in the fact that, whatever a court thinks Congress ought to have done, neither the Act nor its legislative history contains any mention of a reservation for rights-of-way. The continuing value and marketability of those lands are heavily dependent upon certainty of title.[13] As this Court has previously emphasized, Congress itself "intended" that its land grants "should be of present force, . . . *with reasonable certainty.*" *Tarpey* v. *Madsen,* 178 U.S. 215, 227 (1900) (emphasis added).

This recognized need for certainty is clearly reflected in the Court's determination in *Missouri, K. & T. Ry., supra,* that Congress intended to make an absolute conveyance of the lands granted in the Union Pacific Act, subject only to such reservations "as were *specifically*

[12] In other contexts, Congress has made express provision for the reservation of rights-of-way. See Act of July 24, 1947, ch. 313, 61 Stat. 418 (right-of-way for roads to be reserved in patents issued by United States for Alaskan lands), *repealed by* Alaska Omnibus Act, § 21(d)(7), 73 Stat. 146 (1959); 43 U.S.C. § 945 (right-of-way for canals or ditches to be reserved in patents for certain lands).

[13] Uncertainty of title also impairs development and land use.

mentioned."[14] See p. 7, above. The court below, however, has abandoned the longstanding concern with certainty of title in favor of an approach that would allow grants to be limited and qualified, decades after they were made, on the basis of nothing more than judicial speculation as to what Congress might conceivably have intended but never mentioned. By thus indulging it own notion of sensible policy long after the fact, the court has cast doubt on the titles to millions of acres of land that have passed by congressional grant from public to private hands.

The decision below, therefore, presents precisely the kind of issue of large practical "importance . . . to the utilization" of both private and public lands that calls for exercise of this Court's certiorari jurisdiction. Cf. *United States* v. *Coleman,* 390 U.S. 599, 601 (1968). Moreover, this is not a case where review can reasonably be delayed. Action by this Court must come now if

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[14] The *Missouri, K. & T. Ry.* Court specifically emphasized that its "construction" of the Act should "prevent controversies" in the future over title to granted lands. 97 U.S. at 497-98.

The law has long recognized that where the Federal Government withdraws a tract of land from the public domain for some discrete federal purpose—*e.g.*, an Indian reservation—the withdrawal also includes, by implication, a right to unappropriated water in the adjacent public domain insofar as necessary to accomplish the purpose of the withdrawal. *E.g., Winters* v. *United States,* 207 U.S. 564 (1908); *Arizona* v. *California,* 373 U.S. 546, 598-600 (1963). But that doctrine of implied water rights has no relevance for this case. Here, the issue is not the scope of a federal withdrawal from the public domain, but an asserted limitation on an ostensibly unqualified grant to private parties. This Court has never suggested that a grant may be qualified by unexpressed reservations for rights-of-way or any other interest; and the court below offered no justification for judicial implication of such reservations at this late date.

serious impact from the uncertainty created by the decision below is to be avoided.

II. Longstanding Administrative Practice and Construction Confirm the Unprecedented Character of the Decision Below and the Need for Review.

The trial court found that "[f]or 110 years after the grant of the fee lands" made in the Union Pacific Act, "neither the Department of the Interior nor any other agency . . . of the United States construed the grant . . . as conferring any right upon the United States . . . or the public to traverse the lands granted to the railroad." Pet. App. v. So far as we can determine, the appeal of this case is the first occasion on which the United States has asserted that any public right-of-way was reserved under the Union Pacific grant.[15] Had there been such a reservation, it seems certain that generations of public land officials would have asserted it long before now.[16] The absence of any such "assertion . . . by those who presumably would be

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[15] Even in this case, "the Government did not rely" in the trial court on a "theory of an implied reservation in the 1862 grant to the Union Pacific Railroad"; it was only in the Court of Appeals that the United States invoked such a theory. Pet. App. xxv. Moreover, none of the cases relied on by the court below (Pet. App. xii-xvi) involved an assertion by the United States of a reserved right-of-way. See pp. 17-19, below.

[16] Instead, until this case, the United States has regularly acquired rights-of-way over granted lands by purchase of an appropriate easement or similar interest from the owner. The public land records throughout the West reflect numerous such transactions between the United States and successors of the original Union Pacific Railroad, thus confirming federal land officials' longstanding recognition that no easement of way was reserved by Congress in the Union Pacific Act.

alert" to do so is persuasive evidence that no right-of-way was in fact reserved. Cf. *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513, 514 (1949).

Indeed, in the past, the Department of the Interior has clearly construed the railroad land grants *not* to reserve any right-of-way over granted lands. In 1887, the Secretary of the Interior recommended to Congress that legislation be enacted establishing a public access highway around each section of western land, with the section lines marking the center of the highway. The Secretary observed that to the extent affected sections had already passed into private hands—as had occurred in the vast areas where alternate sections had been granted to railroads—such legislation "should provide for necessary compensation" for the private property taken.[17]

Thus, in 1887 the Secretary was well aware that Congress had conveyed unqualified title in such grants as the Union Pacific Act and had not reserved easements of way. His construction, unquestioned until this case, is entitled to great weight, especially since it has bees relied on in countless private land transactions. See, *e.g.*, *United States* v. *Union P. Ry.*, 148 U.S. 562, 571-72 (1893); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Government's sudden reversal in the court below of both this construction and its longstanding administrative practice emphasizes the need for plenary consideration by this Court. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947).

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[17] 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887).

III. The Decision Below Seriously Misconceives the Significance for this Case of the Unlawful Inclosures Act and of Prior Decisions of This Court.

The Court of Appeals purported to find support for its unprecedented approach to construing a railroad land grant in the Unlawful Inclosures Act and in decisions of this Court which it believed "recognized the right of the Government and the public to have access [across private lands] to the public domain . . . ." Pet. App. xvi. The court's reliance on these authorities is misplaced.

The court thought that the Unlawful Inclosures Act provided significant "evidence of congressional recognition *in 1885*" that an easement of way was reserved "*in the 1862* railroad grant." Pet. App. xvi & xi (emphasis added). But the issue is not what a Congress sitting in 1885 may have thought concerning reservations in the grant of lands made over twenty years earlier in the Union Pacific Act. The views of a much later Congress acting on entirely different legislation cannot "change the legislative intent" of the Congress that made the Union Pacific grant.[18] See *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947). See also *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U.S. 523, 537-38 (1920). Thus, even if the Unlawful Inclosures Act had reflected some view of the 1885 Congress that an easement of way was reserved in the 1862 grant, that view would be of no relevance in construing the Union Pacific Act.

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[18] This settled rule applies with special force in this case, since the lands granted in the Union Pacific Act had passed from the United States' dominion and control long before Congress enacted the Unlawful Inclosures Act. See, *e.g.*, *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, *supra*. By 1885, the granted lands occupied no different status than any other private property and Congress' power was limited accordingly.

In any event, neither the Unlawful Inclosures Act nor the underlying legislative history supports the inference drawn by the court below. Both are devoid of any reference to reserved rights-of-way. Instead, the Act is addressed in terms only to unlawful "inclosures of . . . public lands . . . of the United States" and to "prevent[ing] or obstruct[ing] any person from peaceably entering upon . . . or transit[ing] over . . . public lands" by the use of "unlawful means."[19] 43 U.S.C. §§ 1061, 1063.[20] The legislative history shows that the Act was passed, not to create or enforce any right of access over private lands, but rather to outlaw a particular practice by some private owners of "enclosing large areas of lands of the United States [as] trespassers, without a shadow of title to such lands, and surrounding them by barbed wire fences . . . ," thereby monopolizing the public lands and keeping all others off.[21] *Cameron* v. *United States,* 148 U.S. 301, 305 (1893).

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[19] Under the Act, "unlawful means" includes the use of "force, threats, intimidation, . . . fencing or inclosing . . . ." 43 U.S.C. § 1063.

[20] The trial court did not find (Pet. App. i-v) that the petitioners in this case have unlawfully sought to enclose public lands or to prevent the public from moving over such lands. Thus, while the Court of Appeals attempts to inject into this case some flavor of improper interference with access to public lands (Pet. App. vii-viii), it had no basis in the record for doing so. This quiet title action involves no question concerning conduct of the type prescribed in the Unlawful Inclosures Act; the only issue here is whether Congress reserved any right-of-way in the 1862 grant.

[21] For example, Representative Payson, the sponsor of the Act in the House, gave the following explanation of the Act's purpose:

> "[M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them . . . .
>
> . . . . .

The Unlawful Inclosures Act was thus designed to remedy the specific problem of misappropriation of public lands by private parties. As this Court has previously emphasized, the provisions of the Act all "pertain to public lands—not to private lands." *United States* v. *Buchanan,* 232 U.S. 72, 75 (1914).[22] The Act was not concerned with rights in private lands, and it "was not intended to interfere with the use and enjoyment of private property," except where "such use [was] a mere subterfuge for enclosing or preventing access to the public domain."[23] Moreover, the statute is not limited in its application to enclosures involving lands conveyed under railroad grants. In short, the Act provides no evidence at all as to the existence of reserved rights-of-way under such grants.

Nor does this Court's decision in *Camfield* v. *United States,* 167 U.S. 518 (1897), on which the court below relied, reflect any judicial recognition of reserved rights-of-way. That decision merely applied the Un-

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> "It is to open this land up to sale and settlement that this bill is introduced." 15 Cong. Rec. 4769 (1884).

See also S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885) ("The necessity of additional legislation to protect the public domain against illegal fencing is becoming every day more apparent."); H.R. Rep. No. 1325, 48th Cong., 1st Sess. 7 (1884); 15 Cong. Rec. 4769 (1884) (remarks of Rep. Henley); 15 Cong. Rec. 4770 (1884) (remarks of Mr. Rogers).

[22] See also *Omaechevarria* v. *Idaho,* 245 U.S. 343, 349-50 (1918) (The Unlawful Inclosures Act "was designed to prevent the illegal fencing of public land . . . .").

[23] *United States* v. *Rindge,* 208 F. 611, 623 (S.D. Cal. 1913). See also *Golconda Cattle Co.* v. *United States,* 214 F. 903 (9th Cir. 1914); *Potts* v. *United States,* 114 F. 52 (9th Cir. 1902).

lawful Inclosures Act to the very practice the Act was passed to prevent. Private owners of odd-numbered sections that were originally part of the Union Pacific grant had built fences on their property surrounding even-numbered sections owned by the Government. The fences were useless for enclosing the private lands and could "only have been intended to enclose the lands of the Government."[24] 167 U.S. at 528. In sustaining the application of the Unlawful Inclosures Act to such fences, the court nowhere suggested that there was any reserved right-of-way across the private land.[25] On the contrary, the court made clear that an owner of such land "is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor," and could lawfully fence his property as long as his purpose was to protect that exclusive enjoyment rather than only to monopolize public lands. *Id.* Thus,

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[24] The defendants' fence enclosed a square with six sections of land on each side, containing a total of 36 sections. The fence ran completely around the square, being located just inside the outer section line of the three odd-numbered, privately owned sections on each side and just outside the outer section lines of the three even-numbered, publicly owned sections on each side. See 167 U.S. at 520. Against this background, the Court observed:

> "Defendants are certainly within the letter of [the Unlawful Inclosures Act]. They did enclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same . . . ." *Id.* at 522.

[25] The court was concerned exclusively with the defendants' transparent attempt to enclose and monopolize the affected public lands. See 167 U.S. at 522-28. No question as to the means by which the public might obtain access to the public lands was raised or considered, although—as discussed above—the *Camfield* Court was careful to emphasize that it was not restricting the private owner's right to the "complete and exclusive enjoyment" of his granted lands.

if anything, *Camfield* supports the conclusion that Congress conveyed complete and unqualified title to the lands granted under the Union Pacific Act (see pp. 7-8, above).

The Court of Appeals also misread this Court's decision in *Buford* v. *Houtz,* 133 U.S. 320 (1890), as recognizing an implied right-of-way reservation under the Union Pacific Act. *Buford* was concerned with a 100-year old "custom" allowing sheep to run free and graze upon unenclosed land, whether public or private. See 133 U.S. at 326-31.[26] That ancient custom, which was held to permit sheepmen to trail their stock across unenclosed, private checkerboard lands, has no bearing on whether Congress intended to reserve a very different right of access in the grant at issue here. Nothing in *Buford* suggests otherwise.[27]

The decision below is, therefore, based on a seriously mistaken view as to the import for this case of the Unlawful Inclosures Act and this Court's decisions in *Camfield* and *Buford.* In light of the enormous potential impact of the decisions (see pp. 4-6, above), certiorari is warranted to correct the lower court's error. Cf. *McCandless* v. *Furlaud,* 296 U.S. 140 (1935).

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[26] See also *Lazarus* v. *Phelps,* 152 U.S. 81, 84-85 (1894) (*Buford* recognized the "custom of permitting cattle to run at large without responsibility for their straying upon the lands of others . . . .").

[27] *Mackay* v. *Uinta Development Co.,* 219 F. 116 (8th Cir. 1914), upon which the court below also relied (Pet. App. xiv-xvi), was decided on the basis of *Buford* (see *id.* at 120) and likewise has no relevance for the question whether Congress intended to reserve any right-of-way across the lands granted in the Union Pacific Act.

CONCLUSION

For the reasons stated, amici urge that the petition for writ of certiorari be granted.

Respectfully submitted,

RUSSELL H. CARPENTER, JR.
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006

BYRON D. STRATTAN
Suite 1000
110 N. Fourteenth St.
Omaha, Nebraska 68102

C. GEORGE NIEBANK
ROBERT R. BATESON
DENNIS W. WILSON
80 E. Jackson Blvd.
Chicago, Illinois 60604

Counsel for Amici

Of Counsel:

COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006

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